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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 444

MARTIN-LEBRETON INSURANCE AGENCY,
Petitioner,

versus

MANUFACTURERS CASUALTY INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO U. S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

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District Court for the Eastern District of Louisiana, New Orleans Division, entered on September 10, 1956. A rehearing was denied on June 14, 1957.

OPINIONS BELOW

The opinion of the District Court filed on September 11, 1956, is reported in 144 F. Supp. 515; the opinion of the Court below filed on March 28, 1957, is reported in 242 F. 2d 951.

Nine copies of the record as printed for the Court below, the judgment and opinion of the United States Court of Appeals, Fifth Judicial Circuit, and the order denying a rehearing are for convenience appended to this petition.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The date of the decree sought to be reviewed and the date of its entry are March 28, 1957. The date of the order denying a rehearing is June 14, 1957. The statutory provision believed to confer on this court jurisdiction is the United States Code, Title 28, Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1) May the U. S. Court of Appeals sitting in the State of Louisiana in a diversity of citizenship case disregard the applicable codal provision and case law in that state and base its decision on federal cases from other jurisdictions?

2) Where the state law provides for immediate repudiation of an agent's unauthorized act, does not inaction on part of the principal for a period of over 40 days together with retention of benefits derived from such unauthorized act amount to ratification as a matter of law?

LOUISIANA CIVIL CODE PROVISION

Article 3010 of the Louisiana Civil Code of 1870 expressly provides for ratification of unauthorized acts on part of the agent:

> "The attorney can not go beyond the limits of his procuration; whatever he does exceeding his power is null and void with regard to the principal, *unless ratified by the latter*, and the attorney is alone bound by it in his individual capacity."

STATEMENT OF CASE

Petitioner was general representative and agent in New Orleans for respondent under an agreement entered into on June 18, 1948. (Tr. 6-13)

Contractor Geiger applied for performance bonds covering two of his contracts with the Orleans Parish School Board, one in the amount of $2,780 and the one in suit in the amount of $13,800. Petitioner requested authority from respondent to execute the bonds in its name covering the two contracts. By wire of January 23, 1951, authority was granted as to the $2,780 contract. On the same day respondent also wrote a letter to petitioner confirming the wire and stating in addition:

"In regard to the bond of approximately $13,-800 for Mr. Geiger we wish to advise that as soon as you know the other bids we wish that you would let us know immediately and we will see what we can do toward authorizing this bond." (Tr. 29)

On January 24, 1951, after receipt of the wire but prior to receipt of respondent's letter, petitioner wrote respondent advising it —

"We expect both the $2,780 bond and the $13,-800.00 to break momentarily. We assume that it is in order to execute bonds covering both contracts should we be called upon to do so." (Tr. 28).

On January 25, 1951, both bonds were executed by petitioner in the name of respondent, and were, on January 29, 1951, recorded with the contracts in the office of the Recorder of Mortgages for the Parish of Orleans. On January 30, 1951, respondent wired requesting petitioner:

"Do not execute Bond J. H. Geiger Thirteen Thousand Eight Hundred unless authorized, see letter January Twenty-Third." (Tr. 31)

On February 3, 1951, petitioner advised respondent that both bonds had been executed expressing its contention that —

"I feel sure that if you and your underwriting committee look at this case from an objective point

of view, you will concur with the actions already taken." (Tr. 29-31)

Respondent did not answer this letter of February 3, 1951. On March 8, 1951, petitioner forwarded to respondent its report covering insurance and bonds written during January, 1951, and enclosed its check covering respondent's portion of the premium on the bond in suit. (Tr. 34) On March 16, 1951, petitioner advised respondent that there was no doubt that, by reason of the default of the contractor, a loss would be sustained. (Tr. 70) Respondent did not respond until March 21, 1951, when it advised petitioner that it would hold it personally responsible for any loss on the bond. (Tr. 48) At no time did respondent notify the Orleans Parish School Board or the contractor that the bond was unauthorized nor did it make any attempt to cancel the bond. On the contrary, after enlisting the aid of petitioner while insisting on its right to claim reimbursement for any loss, respondent completed the contract; petitioner, under a disclaimer of personal liability on the bond, cooperated fully with respondent in completing the contract as evidenced by respondent's letter of August 1, 1951. (Tr. 33)

Respondent brought suit against petitioner in the United States District Court, Eastern District of Louisiana, New Orleans Division, invoking jurisdiction of this Court based upon diversity of citizenship and amount in controversy exceeding $3,000.00. The District Court granted summary judgment to petitioner on the grounds that respondent by its inaction and silence had ratified the originally unauthorized bond and could, therefore, not make any claim over against the agent for its loss on the bond. (Tr. 70-76)

On appeal to the United States Court of Appeals for the Fifth Circuit this judgment was reversed and the case was remanded with instructions, for trial on its facts. (Tr. 82-99) A subsequent petition for rehearing was denied. (Tr. 123)

REASON FOR ALLOWANCE OF WRIT

Under the United States Code, Title 28, Sec. 1254(1), this Court may grant a writ of certiorari before or after rendition of judgment in the United States Courts of Appeals. Based on the decision of this Court in *United States v. General Motors Corp.*, 323 U. S. 373, 377, 65 S. Ct. 357, 359, 89 L. Ed. 311 (1945), certiorari may be granted even in a case that has been remanded by the Court of Appeals to the District Court with instructions for trial, the reason being that a review of the ruling made by the Court of Appeals is fundamental to the further conduct of the case. True, the *General Motors* case involved the interpretation of a constitutional provision and is, therefore, distinguishable from the instant case; but petitioner respectfully urges that a writ of certiorari should also be granted in a case where the Court of Appeals has reached a judgment totally inconsistent with the applicable law in the jurisdiction as established by the Louisiana Civil Code of 1870 and an unbroken line of decisions by the highest Courts of this state.

Petitioner urges that inasmuch as the ruling made by the Court of Appeals will materially affect the further conduct of this case, this Court may grant a writ of certiorari at this time rather than await the decision of the Trial Court which will necessarily have to be based on the incorrect directions given by the Court of Appeals.

Ever since *Erie v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, (1938) any question as to the source of law to be applied by the Federal Courts in diversity of citizenship cases is moot, and the Federal Courts may not substitute their own interpretation of the state law for that of the State Courts.

Petitioner is prepared to show that the law of Louisiana is settled beyond dispute to the effect that a principal ratifies the unauthorized acts of his agent by failure to repudiate within a reasonable time and by retaining the benefits derived from such unauthorized acts.

This principle was established in the Louisiana jurisprudence as early as 1848 and has never since been questioned. In the case of *Ward v. Warfield*, 3 La. Ann., 468, 471 (1848), the Louisiana Supreme Court held:

> "The principle is well settled that the obligation of an agent, whose authority is limited by instructions, is to adhere faithfully to those instructions. If he unnecessarily exceed his commission, or risk his principal's effects without authority, he renders himself responsible to the principal for the consequences of his act . . . But while this general doctrine may be considered as unquestionable, there are other principles which are equally settled in the law of agency. Subsequent assent, as between principal and agent, is equivalent to a previous authority; and hence where an agent has committed a breach of orders, and the principal, with full knowledge of all the consequences, adopts his acts, **even for a moment,** he will be bound by them, and

> the agent will be discharged. Nor is it necessary that such assent should be expressed. It may be inferred from the conduct of the parties."

Furthermore, "the principal's acts will be liberally construed in favor of a ratification," as evidenced by the opinion in *Flower v. Jones*, 7 Martin (N.S.) 140 (1828). It should be noted in this connection that the principle of ratification as applied in Louisiana is based on French-Roman law rather than the English common law, and that the Louisiana Courts have frequently relied on French commentators in deciding this point. See *Flower v. Jones*, 7 Martin (N.S.) 140, 143 (1828). In fact, the Louisiana Civil Code of 1870, Article 3010, former Article 2979 of Civil Code of 1825, has incorporated the principle of ratification, and decisions under this article definitely favor ratification in such situations. *Pitts v. Shubert*, 11 La. 286, 30 Am. Dec. 718 (1837); *Flower v. Downs*, 6 La. Ann. (1851); *Szymanski v. Plassan*, 20 La. Ann. 90, 96 Am. Dec. 382 (1868); *Oliver v. Johnson*, 24 La. Ann. 460 (1872); *Succession of Gilmore*, 154 La. 105, 97 So. 330 (1923). The latest case on the point of ratification decided by the Louisiana Supreme Court is the case of *Jeffrey Motor Company v. Higgins*, 230 La. 857, 89 So. 2d 369 (1956). In this case the agent was authorized to sell a car for cash, but not on credit. Nevertheless, in violation of these instructions, the agent sold the car accepting the draft, which was turned over to the principal and leposited by the latter. The Court held that the principal's action —

> " . . . in not repudiating the payment by draft at a future date, and in depositing the draft . . . for collection, constituted his ratification."

Upon the weight of this authority, petitioner contends that the Court of Appeals erred in not applying the Louisiana law to this case. The opinion of the Court relies on federal cases from other jurisdictions with the exception of one case, *Canada Steamship Lines v. Inland Waterways Corp.*, 166 F. 2d 57, 59 (1948), which did not even involve the issue of ratification argued by petitioner in this case. In the *Canada Steamship Lines* case, the same Court of Appeals found that:

> "(6) . . . (b) It is established by undisputed proof that until advised of the payment of the duty, plaintiff did not know that any duty had been, or would be, incurred and paid, and it then **immediately and thereafter protested** the payment."

The Court of Appeals apparently believed that it was bound by its decision in that case, without realizing that the facts are entirely different inasmuch as the principal in the *Canada Steamship Lines* case, immediately upon notice of the agent's unauthorized act repudiated the same An analysis of the opinion of the Court of Appeals clearly shows that the Court failed to apply Louisiana case law with the exception of one case which is not controlling at all. But the Court of Appeals went even further than that and instructed the District Court to proceed under the incorrect assumption that the principal's failure to seasonably repudiate the agent's unauthorized acts does not amount to a ratification. This instruction is contrary to Louisiana law and can only result in a mistrial upon remand to the District Court. The District Court may not ignore these instructions and must, therefore, feel itself bound to

apply these erroneous principles laid down by the Court of Appeals.

The facts in the instant case are undisputed, all the evidence is before the court and **both parties agree that the instant case is governed by Louisiana law.** (Tr. 101-117) For that reason, the only question left is whether inaction on part of the principal for a period of 46 days together with retention of the premiums does amount to ratification under the applicable Louisiana law.

This problem was clearly recognized by Mr. Justice Rives, who wrote the dissenting opinion in the instant case stating that:

> "In the present case, the principal waited from shortly after February 3 until March 21st, or for more than forty days, with no answer to the agent's letter of February 3rd, which, especially in view of the previous correspondence, plainly called for a reply if the principal did not intend to ratify the agent's act. In the meantime, the principal had received, deposited and still retains the premium for the bond. That seems to me inconsistent with its contention that the risk of loss was primarily that of its agent. Not until the agent had notified the principal of the certainty of a loss under the bond, did the principal break its silence, refer to the agent's original and admitted lack of authority, and seek to hold the agent personally responsible. That will not do." (Tr. 17)

In the case of *Ward v. Warfield*, 3 La. Ann. 468, 472 (1848) the agent was authorized to sell cotton in New Orleans, but not in a foreign market. In violation of these instructions, he actually did ship cotton to a foreign market and notified his principal thereof. The principal remained silent for a period of 4½ weeks after which he disavowed the agent's act and brought action against him for the loss incurred. The Louisiana Supreme Court held that failure to repudiate for a period of 4½ weeks amounted to ratification, barring the principal from recourse against his agent, since:

> "Under the well settled rule it was his duty to answer in a reasonable time . . . But we cannot but think with the judge below, that, the length of this delay on the part of Warfield, was very suspicious. It looks very much like waiting the fluctuation of the market, to get the certainty whether the shipment to Europe would be beneficial or prejudicial. In morals this does not seem fair towards a party who had acted in good faith for what he supposed the interest of his employer; and, for that reason, the law does not permit it:"

The analogy to the instant case is obvious. In *Ward v. Warfield* the principal repudiated after realizing that the agent's act was detrimental; in the instant case the principal repudiated after **6½ weeks,** and then only upon notice that its agent's act would cause a loss.

In 1848, a period of 4½ weeks was held to be unreasonable. In 1956, in view of improved communication systems, a period of 6½ weeks should certainly be held un-

reasonable as a matter of law. The *Ward v. Warfield* case is still the law in Louisiana and is, therefore, decisive in the instant case.

The instructions given to the District Court are contrary to every Louisiana case on this point and contrary to the principles laid down in *Erie v. Tompkins* for the application of local law. Furthermore, these erroneous instructions will control the trial of the case in the District Court, thereby depriving petitioner of the right to a trial in accordance with state law.

Thus, the decision below interpreting an important codal provision of the Louisiana Civil Code and pertinent cases thereunder leaves the law in uncertainty, and the determination of this question by this Court will settle the point of law and remove the uncertainty and make for uniformity of decisions as to the rights of litigants in cases involving the principle of ratification in agency-principal relationships.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

Frank S. Normann
Attorney for Petitioner

APPENDIX

JUDGMENT

Extract from the Minutes of March 28, 1957.

MANUFACTURERS CASUALTY INSURANCE COMPANY,

No. 16367, versus

MARTIN - LEBRETON INSURANCE AGENCY.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for trial and for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, Martin-LeBreton Insurance Agency, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Rives, Circuit Judge, dissenting."

OPINION OF THE COURT

Filed: March 28, 1957

IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16367

MANUFACTURERS CASUALTY INSURANCE COMPANY,

Appellant,

versus

MARTIN-LEBRETON INSURANCE AGENCY,

Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana

(March 28, 1957)

Before HUTCHESON, Chief Judge, and RIVES and BROWN, Circuit Judges.

HUTCHESON, Chief Judge: Appealing from a summary judgment dismissing, for the reasons stated in the opinion,[1]

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[1]Manufacturers Cas. Ins. Co. v. Martin Lebreton Insurance Agency, 144 F. Supp. 515.

its action to recover damages for loss caused by unauthorized act of the agent in executing a building performance bond, plaintiff is here insisting that the judgment should be reversed because the case was not one for summary judgment but for trial, and because, if the case was one for summary judgment, the judgment should have been for plaintiff.

The facts,[2] insofar as shown, are simple. The law is equally so.

---

[2]On June 18, 1948, defendant became the agent for complainant under an agency agreement which provided among other things: "The agent shall in no case obligate the company except within the limitations in the instructions issued by the company. * * * Agent agrees to keep and observe with all fidelity to company all instructions by it to agent."

The agent had no authority to write contract performance bonds or bonds of any sort.

On Jan. 12, 1951, agent, desiring to write bonds for one Geiger, who it advised "has been recommended to us — Dunn and Bradstreet have no information on him", requested, by night letter, wire authorization to execute a bond on a small painting job for $2780 and temporary authorization to write other bonds for him, pending "your complete investigation".

On the same day the plaintiff sent a telegram to the defendant reading as follows: "Prefer not to authorize painting bond James H. Geiger without full investigation. Writing".

On the same date plaintiff wrote to the defendant expressing lack of confidence in Geiger as a credit risk on the basis of inability to find anything about him, and stating, "We do not feel that we should authorize this bond until such time as the completed financial statement is forwarded to us by Mr. Geiger". It also requested other and full information about him.

Under date of Jan. 23, 1951, plaintiff sent a wire authorizing the $2780 bond and on the same day this authority was confirmed in a letter to the agent in which insurer wrote, "In regard to the bond of approximately $13,800 for Mr. Geiger (which plaintiff had requested authority to write), we wish to advise that as soon as you know the other bids, we wish that you would let us know immediately and we will see what we can do toward authorizing this bond."

In the face of this correspondence and plaintiff's specific refusal to authorize the execution of the bond, the defendant, on Jan. 25, 1951, without any authority to do so, signed the bond, and on Jan. 29, placed the contract and the bond on record in the mortgage office.

Defendant, however, was not advised of the execution until Feb. 3, 1951. The remittance by the agent for premiums written in the month of January was not made until well into March, the execution report is not dated, the check is dated March 8, and it was deposited on March 13, 1951.

On March 16, the defendant wrote to the claim department of plaintiff, advising that there was evidence of a possible loss under the bond.

On March 21, Mr. Cordell, Vice-President of plaintiff, wrote it expressing surprise that it had executed the bond in violation of its express authority and advising that it would hold the agent liable for any loss sustained.

The insurance company thereafter completed the contract, the agent under a disclaimer of personal liability on the bond cooperating fully with the insurer in completing it.

The district judge, stating: "The defendant agency admits that the bond was executed without authority. It argues that, in the state of the relationship between the parties, at the very least the insurer owed it a duty to disavow its action immediately if the insurer intended to do so, in order that the agency could seek another bond to substitute for the one in suit."; held that the defendant was right because, where an agent exceeds its authority, the principal must, to hold him accountable, immediately upon notice repudiate the agent's action. Otherwise, the principal is deemed to have ratified his agent's act, and "where, as here, repudiation by the principal may be unavailing as to third parties and the agent is sought to be held personally accountable, there still arises the duty immediately to notify the agent of disavowal so that he may protect himself if he can."

Proceeding, then, on the motion for summary judgment, to treat the case as though it presented no issue of fact, the court found that the agent had acted in good faith, that the insurer had not acted promptly enough to disavow the agent's authority to act, and that, through its inaction, it had prejudiced the position of its agent and was, therefore, estopped to make any claim over against the agent for the loss on its bond.

We cannot agree with these views. The law is well settled: that an agent owes to his principal the obligation of high fidelity; that he may not proceed without, or beyond, his authority, particularly where he has been forbidden to act; and that, if so proceeding, his actions cause loss to the principal, the agent is fully accountable to the principal therefor.

> "* * * An elementary factor in the principal-agent relationship is control. As stated in I Restatement, Agency, Sec. 14, p. 47: 'A principal has the right to control the conduct of the agent with respect to matters entrusted to him.'" *Ledbetter v. Farmers Bank & Trust Co.*, 142 F (2) 147, at page 150.

This court has had occasion many times to deal with suits against agents for failure to obey instructions. In *Blackshear Mfg. Co. v. Umatilla Fruit Co.*, 48 F(2) 174, a suit for negligence and bad faith of a salesman in extending credit, this court, holding that the evidence was sufficient to take the question to the jury, declared:

> "The law exacts of every agent and employee diligence, good faith, and obedience to instructions in the execution of his agency or employment, and holds him liable for failures therein that occasion damage."

In *Eagle Indemnity Co. v. Cherry*, 182 F(2) 298, the court declared:

> "It is fundamental law that an agent bears a fiduciary relationship to his principal, and owes him the duty of good faith and loyalty. 2 Am. Jur., 202, Sec. 251, 261, 268. By virtue of this relationship, no agent is entitled to take any unfair advantage that his position may offer him to profit at his employer's expense, beyond the agreed compensation for his service."

In *Palmer v. Chamberlin*, 191 F(2) 532, this court again declared:

> "Likewise, 'an agent is a fiduciary with respect to the matters within the scope of his agency' 2 Am. Jur. Agency, Sec. 252."

Finally, in *Canada Steamship Lines v. Inland Waterways Corp.*, 166 F(2) 57, a suit brought in Louisiana by a principal against his agent for damages for failure to follow his instructions, this court, holding the agent liable, discussed fully the principles controlling in suits between principal and agent of the kind presented here. There, stating:

> "The general principles of the law of agency as they apply here, are not in confusion. They may be found set down in Am Jur., 'Agency', Secs. 251-278. They leave in no doubt that where, as here, an agent has been given general instructions to clear a shipment, which instructions could be carried out in the interest of the principal without incurring duty, if the agent, without returning for more instructions, assumes to take a course in carrying the instructions out which subjects the shipment to duty, the agent, and *not the principal*, must bear the loss."

we gave full application to these principles.

Under the undisputed facts in this case and the settled law applicable thereto, unless and until the principal, with full knowledge of all the applicable facts, waives the breach of his instructions and adopted the agent's act, in writing

the bond, as its own, the agent becomes and remains liable to the principal for the damages resulting from its assuming to act to the disadvantage of its principal without authority and in breach of instructions. In short, in the absence of clear proof of facts showing an express and knowing adoption of the agent's act as its own, or otherwise raising an estoppel against the defendant to assert the admitted breaches of the agent's obligations as a fiduciary, the matter stands, as it stood in the Canada Steamship Line case, *supra*, where this court said of an agent:

> "Defendant, acting precipitately and unreasonably, and without authority, incurred the duty (here the loss). It, and not plaintiff, should pay it."

The case was not tried and determined on its facts. Instead, it was determined as matter of law and without a trial on the incorrect assumption that, notwithstanding the agent's admitted and grievous breach of its duty, it could escape the loss and throw it on its principal, *upon the mere claim that the principal did not immediately repudiate the bond*. The law is not so written.

The judgment is REVERSED and the cause is REMANDED for trial and for further proceedings not inconsistent herewith.

RIVES, Circuit Judge, Dissenting:

The sole and simple issue in the district court was whether the principal, Manufacturers Casualty Insurance Company, as between itself and its local agent in New Orleans, ratified the act of the agent in writing a contract performance bond. There was no claim that the agent had original authority to write such a bond.

On January 12, 1951 the agent sent a night letter telegram to the principal advising that one Geiger was the successful bidder on "a small painting job for $2780," giving a brief summary of Geiger's experience, assets and liabilities and requesting authority to execute the bond. On the same day the agent wrote the principal an air mail special delivery letter giving additional information about Geiger, and concluding:

> "Mr. Geiger, I am quite sure will be formally awarded the contract referred to in my letter of $2,780.00 on Monday and he has a bid out of $13,800.00 on which there is a possibility he may also be awarded that contract. This makes a total of $16,580.00.
>
> "We would like to get this man started and in the light of this additional information which I have developed for you I would appreciate your letting us have authorization by wire."

Still on the same date, January 12th, the principal wired the agent: "Prefer not to authorize painting bond James H. Geiger without full investigation. Writing."

The principal's letter of the same date to the agent read:

"Re: James H. Geiger, d/b/a Bennette's
Contracting Co.
Painting Job approximately $2780.

* * *

"Immediately upon receipt of your night letter we wired you stating that we preferred not to authorize this job without full investigation. We know nothing whatsoever of Mr. Geiger and upon looking over the Dun & Bradstreet book for January of this year, we cannot find that he is even listed personally; neither is the Bennette Contracting Company. While we have no doubt the statement which you have made in this night letter is correct, we still do not feel that we should authorize this bond until such time as a completed financial statement is forwarded to us by Mr. Geiger. We also would like the names of the supply houses from whom he makes his purchases and verification of the cash in bank. As soon as these papers are submitted we will be very glad to commence our investigation and, if satisfactory, will see what we can do towards giving you authority to execute bonds for this concern.

"In your night letter you state he has Accounts Receivable of $1400. As no information is given as to these Accounts Receivable, we are wondering if perchance they might be some receivables

from some small painting jobs which he has already done.

"Please forward the necessary papers immediately and we will do the best we can for you for this concern."

So far as the present record shows, the next communication was on January 23rd, when the principal wired the agent: "Authorize contract bond two thousand seven hundred eighty dollars James H. Geiger—"

Also on January 23rd, the principal wrote a letter to the agent as follows:

"This will confirm our wire authorizing you to execute a bond for James H. Geiger covering a contract of approximately $2780. In regard to the bond of approximately $13,800. for Mr. Geiger we wish to advise that as soon as you know the other bids we wish that you would let us know immediately and we will see what we can do toward authorizing this bond."

On the next day, January 24th, the agent wrote to the principal:

"Gentlemen:

RE: J. H. Geiger

"Thank you for your authorization in connection with the above case authorizing the execution of

the bond for $2,780.00. We are sorry that we had to rush you so much in this case, particularly since nothing has happened as of this day. However, we expect both the $2,780.00 and the $13,800.00 to break momentarily. We assume that it is in order to execute bonds covering both contracts should we be called upon to do so.

"Our principal as previously explained will not undertake any other job until these are completed."

On the next day, January 25th, both bonds were executed by the agent in the name of the principal, and on January 29th, the contracts and the contract performance bonds were placed on record in the Mortgage Office for the Parish of Orleans. Thereafter, on January 30th, the principal wired the agent: "Do not execute bond J. H. Geiger thirteen thousand eight hundred unless authorized see letter January twenty third—"

On February 3rd, the agent wrote the principal:

"RE: James H. Geiger—your letter of January 23, 1951.

* * * * *

"As to James H. Geiger, we executed the bond authorized in the sum of $2780.00 and he was also awarded the contract which we discussed over the telephone for $13,800.00. He was low bidder by $1560.00. The $13,800.00 case and the $2780.00 broke simultaneously. Mr. Geiger called very early on

the morning of January 25, 1951 and asked me to meet him in the notary's office at 9:30 a.m., which I did, and we executed both bonds since his bid was in line.

"As previously explained, Mr. Geiger was well recommended by the people we contacted as to honesty, integrity, and ability, with the further fact that he has handled like jobs of this size and larger before.

"The delay in corresponding with you was due to the fact that I was waiting for a copy of the contract from the Orleans Parish School Board's notary in order that we may furnish you with all pertinent papers at one time.

"I feel sure that if you and your underwriting committee look at this case from an objective point of view, you will concur with the actions already taken."

So far as the record shows, there were no further communications between the principal and agent for more than a month. On March 8th, the agent forwarded to the principal its regular reports covering insurance and bonds written by it during the month of January, enclosing with said reports the principal's portion of the premiums in the amount of $208.49. The premium for the $13,800.00 was listed in the reports as "Policy No. 42699, Assured—Bennettes Contr. Co., 30% Bonds 138.00, Contr. gem, Total Premium 138.00." The check was deposited by the principal on March 13, 1951, and is still retained by it.

On March 16th, the agent wrote to the claim department of the principal:

RE: Bond No. 42699—Manufacturers—
Bennette's Contracting Company

"I know that you will sustain a loss under the above captioned. We have not been notified officially or unofficially. However, there is mounting evidence at this time to justify my opinion.

"Kindly let us or your attorney have your instructions as the specifications provide that the Surety has only ten (10) days to act once they are officially notified.

"Through our contracting connection, I believe we can minimize the loss and you may rely upon us for our utmost cooperation."

The agent's previous communications had been directed to the Superintendent of the Contract Department of the principal at the same address, 1617 Pennsylvania Boulevard, Philadelphia, Pennsylvania.

On March 21st, the vice-president of the principal wrote the agent:

"RE: Bond 42699—James H. Geiger dba
Bennett's Contracting Co.

"We are indeed surprised to receive execution report from your office advising that you had exe-

cuted the above captioned bond in the amount of $13,800. for James H. Geiger, doing business as Bennette's Contracting Company, for water-proofing exterior of Warren Easton High School, New Orleans, La., without having authority from this office for the execution of the bond.

"Your files will clearly indicate we did not authorize execution of this bond and in fact we wrote you on January 23rd advising that we were not authorizing the bond. We also wired you on January 30th not to execute this bond.

"At the time power of attorney was given you we issued to you underwriting instructions, by the terms of which you agreed to submit all contract bonds to this office for approval before execution. We have copy of Limitations of Authority signed by both G. E. Martin and Edward F. LeBreton, Jr.

"Since you have violated your underwriting instructions and agreement in connection with the issuance of this bond, we will expect to hold you responsible for any loss which we may sustain by reason of the execution of this bond in violation of your authority."

Upon the default of the contractor, Geiger, the principal took over the work, enlisted the aid of its agent in securing bids from other contractors, and the agent, under a disclaimer of personal liability, co-operated with the principal in completing the contract.

Under the foregoing undisputed facts, the learned district judge, in a clear and full opinion reported as *Manufacturers Casualty Insurance Co. v. Martin-LeBreton Insurance Co.*, 144 F. Supp. 515, held that as between the principal and the agent, the principal had ratified the act of the agent.

I think that the district judge was correct. As said in I Restatement, Agency §94, p. 234:

> *"An affirmance of an unauthorized transaction may be inferred from a failure to repudiate it.*
>
> *"Comment:*
>
> "a. Silence under such circumstances that, according to the ordinary experience and habits of men, one would naturally be expected to speak if he did not consent, is evidence from which assent may be inferred. * * * * * Whether or not such an inference is to be drawn is a question for the jury, unless the case is so clear that reasonable men could come to but one conclusion."

See also, 2 Am. Jur., Agency, §§232, 233.

That this principle applies as between principal and agent is made plain by the opinion of the district court, see 144 F. Supp. at p. 517. If further Louisiana authority to that effect is needed, I would cite: *Dupre v. Splane*, 16 La. 51; *Starr v. Zacharie*, 18 La. 517; *Reed v. Ritchey*, 2 La. Ann. 796; *Stanfield v. Tucker*, 4 La. Ann. 413; *Beau v. Drew*, 15 La. Ann. 461; *Featherston v. Graham*, 17 La. Ann. 42; *Raymond v. Palmer*, 6 So. 692, 41 La. Ann. 425, 17 Am. St. Rep.

398. In the last cited case, the Supreme Court of Louisiana said:

> "The principle which gives legal effect to acts of an agent unauthorized by, or in violation of, his mandate, in consequence of the silence or acquiescence of the principal, is quite familiar in our jurisprudence. In the case of Ward v. Warfield, 3 La. Ann. 468, the agent, to whom cotton had been consigned for sale in New Orleans, shipped it to Liverpool, where it was sold, for account of his principal, at a price less than the market value of the cotton in New Orleans at the date of the shipment to Liverpool. The principal had been notified of the transaction, and had been offered the option of accepting the risk of the venture, or of closing the sale with the agent at the stipulated market value of the cotton in New Orleans at the time. In the meantime the cotton market in Liverpool had depressed, and the cotton was sold there at a reduced price, resulting in a considerable loss from the amount of credits allowed to his principal by the agent; and suit was brought by the latter for the recovery of the difference between the credit thus given and the actual proceeds of the sale of the cotton. The offer of the agent to take the cotton at its market value in New Orleans remained unanswered for one month, at the end of which time the principal answered that he accepted the offer of purchase by the agent. But the court held the silence of the principal for one month to be equivalent to an acquiescence in the acts of the agent; and the latter recovered his demand.

The court said: 'The principle is well settled that the obligation of an agent, whose authority is limited by instructions, is to adhere faithfully to those instructions. If he unnecessarily exceeds his commission, or risk his principal's effects without authority, he renders himself responsible to the principal for the consequences of his act. If loss ensue, it furnishes no defense to him that he intended the benefit of his principal. But, while this general doctrine may be considered as unquestionable, there are other principles which are equally well settled in the law of agency. Subsequent assent, as between principal and agent, is equivalent to a previous authority; and hence, where an agent has committed a breach of orders, and the principal, with full knowledge of all the consequences, adopts his acts, even for a moment, he will be bound by them, and the agent will be discharged. Nor is it necessary that such assent should be express. It may be inferred from the conduct of the principal.'

"In the case of Lafitte v. Godchaux, 35 La. Ann. 1161, this court applied the doctrine under circumstances quite similar to the facts disclosed in the present case. The pledgee of certain shares of insurance stock had reported to the pledgeor a sale thereof, under the authority of the act of pledge, and claimed a balance due him on account of his note secured by the pledge, which the pledgeors made good. Subsequently, the latter brought suit for the recovery of the stock on the ground that the pledgee had not truly sold the stock, but had detained the same for his own account. While the

court conceded that the sale made by the pledgee was a nullity, it rejected plaintiff's demand, on the ground of his acquiescence, resulting from long silence after full knowledge of the facts. It was said in that case: 'In such a transaction the relation of the pledgee to the pledgeor is precisely that of an agent to his principal, and the validity of his acts must be tested under the same rules. Those rules are well known and firmly established in our jurisprudence; and they hold the acquiescence or long silence of the principal touching an unauthorized or illegal act of his agent as a ratification of the act or contract of the agent.' See, also Allison v. Watson, 36 La. Ann. 616; Bennett v. Bank, 34 La. Ann. 150; Starr v. Zacharie, 18 La. 517; Dupre v. Splane, 16 La. 51." *Raymond v. Palmer*, 6 So. 692, 695, 696.

In the case principally relied on by the principal, *American Fire & Marine Insurance Co. v. Seymour*, 144 So. 775, it was held that casualty insurance policies issued by the local agent without actual authority were not ratified because the insurer failed to cancel them within *three days* after notice of issuance reached the general agent's office.

In the present case, the principal waited from shortly after February 3 until March 21st, or for *more than forty days*, with no answer to the agent's letter of February 3rd, which, especially in view of the previous correspondence, plainly called for a reply if the principal did not intend to ratify the agent's act. In the meantime, the principal had received, deposited and still retains the premium for the bond. That seems to me inconsistent with its contention

that the risk of loss was primarily that of its agent. Not until the agent had notified the principal of the certainty of a loss under the bond, did the principal break its silence, refer to the agent's original and admitted lack of authority, and seek to hold the agent personally responsible. That will not do.

Principals are under just as much obligation to deal honestly with their agents as agents are with their principals. It seems to me that simple honesty of dealings between the parties requires an affirmance of this judgment. I, therefore, respectfully dissent.

ORDER DENYING REHEARING

Extract from the Minutes of June 14, 1957.

MANUFACTURERS CASUALTY INSURANCE COMPANY,

No. 16367, versus

MARTIN-LEBRETON INSURANCE AGENCY.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.